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In the Matter of the Petition of Genwal Resources Inc. for Review of Division Order DO10A; Crandall Canyon Mine, Carbon County, Utah.	DIVISION'S RESPONSE TO PETITION FOR REVIEW Docket No. 2010-026 Cause No. C015/0032 F

The Utah Division of Oil, Gas and Mining submits this Response to the Petition of Genwal Resources Inc. for review of Division Order 10A, in accordance with the provisions of the Rules of the Board of Oil Gas and Mining, at Utah Admin. code R641-105-200.

Jurisdiction

This petition is not governed by the provisions of Utah Code § 40-10-14 as alleged by Genwal since it does not seek review of a decision to grant or deny a permit application. This Petition seeks review of the Division's Order that the permit must be modified and that additional bonding is required. It is governed by Utah Code § 40-10-12(3) and § 40-10-15(5). The Board has jurisdiction to hear the Petition pursuant to the provisions Utah Code §§ 40-10-6(4) and (7), Utah Code § 40-10-6.7(2); and Utah Admin. Code R645-303-213 and R645-300-200 (Administrative and Judicial Review of Decisions on Permits); and the Procedural Rules of the Board (Utah Admin. Code R641-100 et seq.).

Response to Itemized Allegations

In response to the itemized allegations in the Petition, the Division responds as follows.

1. The Division admits the allegations of paragraph 1.

2. The Division admits the allegations of paragraph 2 so far as they allege that Genwal suspended underground operations following the tragic mine accidents of August 2007, but denies that Genwal installed permanent barriers and affirmative alleges that the mine portals were sealed with temporary seals.

3. The Division admits the allegations of paragraph 3 and 4.

4. The Division admits the allegations of paragraph 3, except to deny that the Division Order DO-08A was issued on March 22, 2008 and affirmatively allege that DO-08A was issued April 22, 2008.

6. The Division admits the allegations of paragraphs 6 and 7 and Division affirmatively alleges that although Genwal responded to the notice, its response on April 23, 2008 did not fully resolve the water quality problem and was not a final response.

7. The Division admits the allegations of paragraph 8 except to deny that the water quality problem was identified as high levels of "soluble iron", and affirmatively alleges that the problem was identified as high "total iron" levels in the discharge water.

8. The Division admits the allegations of paragraphs 9, 10, 11, and 12 of the Petition.

9. The Division admits the allegations of paragraph 13 except to deny that the DO 09A required treatment of "soluble iron" and affirmatively alleges that the DO 09A

required treatment of "iron contaminated waters" and also required Genwal to post within 60 days a bond to cover the cost of funding of ongoing and continual treatment of the mine water discharge. The Division further alleges that Genwal knew as of April 23, 2009 that the violation of the water quality standards cited by DWQ was also a violation of its mining permit, the Coal Act and the regulations covering the coal mining operations, and that the August 10, 2009 NOV also required abatement of the violation by reducing the of the high levels of iron in the discharge waters.

10. The Division admits the allegations of paragraphs 14 and 15 except to deny that the water quality problem was identified as high levels of "soluble iron", and affirmatively allege that the problem was identified as "iron contaminated waters". The Division further alleges that OSM's release of TDN #X09-140-182-001 was based on the Division's issuance of DO-09A, which required Genwal to post a bond to cover ongoing and continual treatment of mine water, and that as no such bond has been posted by Genwal, the potential violation cited by OSM in TDN #X09-140-182-001 and DO 9A were not fully abated.

11. The Division admits the allegations of paragraph 16 so far as they allege that there is a Settlement Agreement with DWQ for the DWQ violations that requires a mitigation project to be completed and that water discharge as treated now complies with the terms of Genwal's UPDES permit. The Division affirmatively alleges that the Settlement Agreement attached as Exhibit F speaks for itself and therefore the Division denies that the characterization of the Settlement Agreement as set forth in Paragraph 16 fully or accurately sets forth the terms of the Settlement Agreement.

12. The Division admits the allegations of paragraphs 17, 18 and 19 but denies that any operating costs for the mine water treatment facility have been provided to the Division.

13. The Division admits the allegations of paragraph 20 so far as it alleges the email was sent, but affirmatively allege that the Petitioner's characterization of the communication as set forth in paragraph 20 is incomplete and does not accurately set forth the position of OSM with regard to the discharge from Crandall Canyon mine or OSM regulations, and that the email and regulations are the better evidence of such facts.

14. The Division admits the allegations of paragraph 21 so far as they allege that thee was a meeting on February 4, 2010 with Genwal, and its counsel and its consultant Erik Petersen to discuss abatement of DO-09A and the probable source of the high iron and the extension of 30 days to submit a plan of abatement. The Division denies that there was a discussion about "soluble iron" levels and further denies that the allegations accurately characterization of Erik Petersen's statements as having "debunked speculation" by the Division regarding the cause of the high iron levels in the discharge.

15. The Division admits the allegations of paragraph 22 and 23 as generally accurate statements of the letter of March 1, 2010 and the February 25, 2010 report by Erik Petersen, and allege that the report and letters more fully and completely set forth the facts evidenced therein.

16. The Division admits the allegations of paragraphs 24 and 25.

17. The Division denies the allegations of paragraph 26 and affirmatively allege that the Division's Hydrologic Evaluation Report is not accurately characterized by the paragraph and that the report is based on scientific and technical analysis of data and

studies and information and that the language in the report is technical and precise and is not accurately summarized by the allegations in paragraph 26.

18. The Division admits that the allegations of paragraph 27 except to allege that the Division Order provides a more complete and accurate statement of the required actions.

19. The Division admits the allegations of paragraphs 28 and 29.

20. The Division denies the allegations of paragraphs 30 and 31 for lack of information of belief as to the truth or falsity thereof, and affirmatively alleges that bonding and other means of financial assurances have been required by other states as a condition for permits for coal mining operations and that other operators including Genwal's parent corporation Murray Energy have provided such bonds or financial assurances for treatment of mine-water discharges in perpetuity as a necessary condition for operation; and further alleges that the cost of bonding for treatment to prevent damage from mine-water discharges is not a relevant factor to be considered by the Division when determining if a permit protects the public health and safety and the hydrologic regime from adverse effects of mine waters that result from a permitted mining operation as required by the Utah Coal Act and its regulations.

Additional Responses to Factual Allegations Contained Argument

21. The Division denies that the discharge at issue is not addressed in the current MRP, and affirmatively alleges that the MRP at page 7-47 provides: " [t]here is every reason to believe that water will permanently discharge from the Crandall Mine portals" and that "[i]t is now the consensus that the elevated iron concentrations will be a permanent situation, and that the reclamation plans must provide for a permanent means

of treating the discharge water so as to meet the UPDES requirements, even subsequent to final reclamation." In addition, Appendix 7-65 is entirely devoted to treatment of the mine-water discharge in order to remove iron contamination.

22. The Division denies that there are other Utah mines with contaminated mine water drainage that have been allowed to provide for treatment without posting a bond to cover post-mining treatment costs, and affirmatively alleges that there are no similarly situated mines with anticipated post-mining drainage known to violate water quality standards. The Division admits this is the first, but probably not the last, instance in Utah of such a condition requiring a long term funding mechanism for post-mining water treatment.

RESPONSE TO PETITIONER'S ARGUMENT

The Division hereby briefly sets forth its arguments in Response to Petitioner's Argument.

I. **The Coal Act and regulations require Genwal to modify its permit when conditions change and require that the modification address long-term treatment of the mine discharge waters as necessary to protect the hydrologic balance and meet water quality standards after mining ceases.**

A. The Coal Act and regulations requires protection of the hydrologic regime and compliance with water quality standards for all discharges during and after mining.

There are numerous provisions in the Coal Act (Utah Code § 40-10-1 though §40-10-30 (2010) and the regulations (Utah Admin. Code at R645-100 though 645-402

(2010) requiring that Utah's coal mining operations be designed, and operated in a manner that complies with the state and federal water quality standards. (Utah Code§ 40-10-11(2)(a) and (c); Utah Code § 40-10-17(2)(b), (h), (j), (n), (q) and (x); Utah Code § 40-10-18(11), (13), and (14); and the applicable rules at Utah Admin. code R645-301-700; and particularly R645-301-750 and 751) In addition, mine operations are required to be designed and operated in a manner that prevents material damage to the hydrologic balance outside of the permit area.

The regulations require that compliance with water quality standards and protection of the hydrologic balance continue through bond release and into the period of post-mining land use. Utah Admin Code R645-301-729, 731, and 750. The very intent and purpose of the Coal Act is to prevent damage to the lands *and waters* of the United States both during and after coal has been mined. The goal of the Act is to prevent water pollution problems such as acid mine drainage just as fully as it is to require prompt and full reclamation of mined lands. Utah code §40-10-2(5) and Utah Admin. code R645-300-133.400

B. The amount of the surety must be sufficient to protect the hydrologic regime and to satisfy water quality standards for any post mining discharges.

The amount of the required surety is to reflect the difficulty of reclamation giving consideration to such factors as topography, geology, and hydrology. Utah code § 40-10-15(1) Release of the reclamation surety or bond is conditional upon a finding that all reclamation, restoration, and abatement work under the permit has been completed and that no pollution of surface and subsurface waters is occurring ((R645-301-850 and 880).

The thrust of the surety requirements for an initial permit application is to focus on the anticipated reclamation and re-vegetation of the mined lands. If the probable hydrologic consequence (PHC) and the cumulative hydrologic impact assessment (CHIA) as required for the permit predict a perpetual contamination of the surface waters by a post-mining discharge, the findings required for approval the application can not be made and the permit can not be approved. However, the required surety amount is not limited to reclamation costs. If after mining has commenced, it is discovered that the conditions are not as they were expected, the Coal Act requires the Division to enforce and bond for compliance with all of the terms and conditions of the permit and regulations including protection of water quality and hydrologic balance during and after mining. (Utah Admin Code R645-301-729 and R645-301-731).

C. Genwal must submit an application for a modification of its permit and the bond when conditions have changed. The modification must satisfy all of the conditions for an original permit including protection of water quality and the hydrologic balance outside of the permit area and adequate bonding.

The requirements of the Coal Act include the requirement that the MRP must be modified when it appears that conditions have changed. Utah Admin. code R645-303-122, 212 and 213; and R645-301-728.400, and 729.200. Modification of the permit application requires a review of the bonding required for the operation (R645-301-830.400). Such a change includes circumstances such as those at Crandall Canyon where an unexpected a discharge has developed that results in a violation of water quality standards and causes material damage to the hydrologic regime unless the discharge is treated. The required Cumulative Hydrologic Impact Assessment must include a finding

that there will be no material damage to the hydrologic regime. This required finding applies to the long-term impact of mining as well as the period of operations. Genwal must modify the permit to include the treatment facilities construction and the treatment plans. Genwal must also provide assurances that there will be a permanent prevention of any surface water pollution caused by post-mining discharge of mine water.

If the Division is unable to make the findings required by the Act that water quality standards will be complied with during and after mining, and that there will be no material damage to the hydrologic balance outside of the permit area during and after mining, then the application for modification of the permit must be denied. The operator is under an obligation to provide sufficient evidence to support a finding that these obligations will be satisfied. In addition, if Genwal cannot meet this requirement regardless of the status of the modification application, they are in violation of the Act. The evidence of compliance must reasonably include both a technical determination about feasibility and adequacy of treatment and a financial determination that treatment will be provided if mining operations were to cease. The burden of proof is on the applicant to make that showing or mining cannot continue. (Utah Code § 40-10-11(2), and Utah Admin. Code R645-300-133.)

Accordingly, the validity of the Division's Order it is dependent on whether the Coal Act may require bonding for treatment of post-mining discharges of contaminated water, but whether the operator can provide sufficient assurances that water quality will be protected outside of the permit area. If Genwal cannot provide such information and agree to such conditions then the finding cannot be made and the mine permit modification cannot be approved. (Utah code §40-10-11(2)(a) and (c).)

D. If the Division cannot approve the modification, the Division must issue a notice of violation, order cessation of mining, and require reclamation.

If Genwal cannot provide sufficient assurances that water quality will be protected outside of the permit area, Genwal is in violation and must take actions to abate the violation. The permit is out of compliance if a modification is not approved. Failure to provide an acceptable modification will result in a finding of an unabated violation, a cessation order and eventually an order to reclaim. Reclamation must include abatement of water quality problems associated with the mine discharge. The Division cannot release the bond if water pollution problems remain. (R645-301-880.200)

If the mine operations are not reclaimed as required by the Act (R645-301-731) then the operator and owners and controllers are precluded from being owners or operators for any other mining operations (30 C.F.R. §773.20(a) and (c)) Additionally owners and controllers may become personally responsible for taking actions to prevent and remedy damage to the hydrologic regime that is a result of the mining operations during the period they were in a position of control. (30 USC § 1271, United States v. Dix Fork Coal Co., 692 F. 2d 436 (6th cir. 1982), United States of America v. Bruce Y. Peery, 862 F.2d 567 (1988 U. S. App.), United States v. Hubler, 117 B.R. 160 (1990, U.S.D.)

E. Rulemaking is not required.

The Coal Act requires that an operator meet "all applicable performance standards . . . and such other requirements as the division shall promulgate" Utah code §40-10-17 (1); and "minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and

ground water systems both during and after surface coal mining operations and during reclamation by: (i) avoiding acid or other toxic mine drainages by suchmeasres as , but not limited to: (B) treating drainage to reduce toxic content with adversely affects downstream water upon being released to water coursed; . . . and (vii) such other actions as the division may prescribe." Utah code § 40-10-17(j) The surety requirements implicitly include providing a surety that will be maintained so long as necessary including a period of perpetuity. The Coal Act expressly requires that prior to release of a surety the Division must consider "whether pollution of surface and subsurface water is occurring, the probability of continuance of future occurrence of the pollution and the estimated cost of abating the pollution." Utah code 40-10-16(2) Most importantly, the bond "is conditioned on faithful performance of all the requirements of this chapter [Coal Act] and the permit." Utah code § 40-10-15(1) Given the hydrologic protections required this requirement is clear authority enough to require bonding in perpetuity if needed.

Some states have established rules to govern the management of such long-term financial assurances. To accommodate the need for security for such treatment they have elected to proceed with rules to facilitate the form and options of financial resources available to an operator for posting such security. However, states such as Pennsylvania have also used Stipulated Orders to settle violations and establish a bond for perpetual treatment.

The Division is open to the Board establishing rules establishing procedures or approving of types of financial means for setting up and managing a fund to be used to

pay for perpetual treatment of polluted mine-discharge waters, but does not believe such rules are required for the Division Order to be valid.

II. Temporary cessations does not provide a basis to ignore the water quality problems, but rather requires full compliance with the terms and conditions of the permit and the Act.

The regulation governing temporary suspension of operations requires notice and approval of the Division and does not waive any of the requirements of the permit and the Act. (R645-301-515.310). Rather, if the temporary suspension is the result of a change in circumstances such as the tragic mine disaster, then the operator is obligated to amend the permit to address the new circumstances. The Crandall Canyon disaster has substantially modified the circumstances and facts that existed when the mine permit was issued: the existing mine workings have been closed to mining and may very likely not be permitted to re-open; there is a loss of access to the mine workings that precludes water treatment within the mine as was done previously; termination of pumping within the mine workings has resulted in the unexpected discharge of water and has required construction of a water treatment facility. Future mining if any will be in new area of coal tracts requiring modification of the R2P2 by the BLM.

These change in circumstances as a result of the mine discharge require a revision of the PHC and the CHIA as is acknowledge by Genwal in its revised MRP. Modification of a permit requires the Division to re-examine compliance with all of the requirements of the Act including the sufficiency of the surety R645-301-830.400 and is not a waiver or suspension of the permit or the Act.

III. The Division's Order is not arbitrary but is based on reasonable conclusions drawn from a thorough study and evaluation of the facts and is not inconsistent with its practices as applied to other mines under similar circumstances.

The Division Order and the Hydrologic Evaluation Report made a complete and professional analysis of the mine discharge problem. The Hydrologic Evaluation Report included a summary of the mine history, a thorough evaluation of the discharge water flow and chemical characteristics, identification of the potential sources of the mine water, an evaluation of the probable iron source, and a review of the literature describing trends in mine water chemistry at Utah coal mines, and a review of reports describing mine water at Crandall Canyon mine, including the February 2010 Petersen Hydrologic Report.

The Division's hydrologist compared the data and conclusions from his evaluation with the report provided by the Genwal's consultant Erik Petersen and concluded that Genwal's conclusion that the high levels of iron in the Crandall Canyon mine discharge water are a temporary phenomena was not supported by any facts or site data. The only tangible line of evidence presented in the Petersen Hydrologic report is a comparison between the mine water discharge from Skyline Mine CS-14 and Crandall Canyon; however, the Hydrologic Evaluation Report identifies significant differences between the sites that critically limit any reliance on predictions based on this comparison. The Division concluded based on site data and referenced literature and studies that conditions are present at the Crandall Canyon capable of supporting ongoing

discharge of mine water with elevated concentrations of iron. The Division further concluded that, absent additional data, there is no basis to expect that the concentration of iron would decline to a level not requiring treatment in the foreseeable future. Accordingly, the Hydrologic Evaluation Report recommended that studies be completed to design a suitable perpetual treatment system.

A review by the Division of all of its operating mines has revealed no similar mine with a potential for post-mining discharge of waters in violation of water quality standards and in need of perpetual treatment. The Petitioner is obligated to put forth a factual basis for this claim.

V. The Division Order is not illegal because it is provisional; but such action is appropriate to protect the public interests. The Division Order adequately incorporates the applicable rules and procedures for determining the final amount of a bond modification.

The Division Order requires that Genwal provide the Division with a bond or trust fund or other financial instrument acceptable to the Division that will yield a yearly payment sufficient to cover long-term mine discharge water treatment costs. The Division Order requires that the amount will be adjusted when more detailed costs are known. The Division Order does not bypass the rules but expressly provides that the Division will comply with the requirements for an informal conference and public notice before the Division makes the final amount determination. Given the unique nature of the obligation and the need for refinement, the Division merely extended to Genwal the option to make an initial determination as to the amount of the bond. This is not

inappropriate especially since the procedures provided for in the rules are specifically addressed and will be required.

The mine's unanticipated discharges have continued at levels that are in violation of the clean water standards unless treated since October 2008. The potential long-term liability for these costs requiring adequate financial security to cover them will be at least $30 million. The Division is charged with protecting the public from such damages. Although there are means that are available to seek enforcement against Genwal's owners and controllers, the law requires the operator to address such an obligation when it becomes apparent. The evidence as set forth in the Division's Evaluation Report demonstrates that it is likely that the discharge will continue and will continue to require treatment to meet water quality standards.

While Genwal is within its rights to appeal the Division Order, the fact that the costs are still be refined does not make it illegal to require an surety of an approximate amount now. The protective actions must be taken when the problem is identified and not wait for a final plan. It would be irresponsible for the Division to ignore its regulatory obligations to require such security while the Operator continues to refine the treatment. Genwal is entitled to its hearing, but the fact that the Division Order does not ask for a fixed amount is not a reason for invalidating it. The provisions of Utah Admin. Code R645-301-830 that allow for a notice and informal conference to address the final changes in the amount of the surety are required by the Division Order, and are not ignored.

RELIEF REQUESTED

The Board should uphold the Division Order. It is required by the Coal Act to address the public health and safety concerns that have arisen at the Crandall Canyon mine as a result of the toxic mine discharge. The Act grants the Division full authority to require a modification of the permit including a requiring Genwal to provide sufficient bond or other financial instrument that will prevent damage to the surface waters of Utah and violations of the water quality standards for as long as the conditions persist. The Division's Hydrologic Evaluation is sound and based a scientific analysis of all pertinent information. The Division's Order does not arbitrarily single out Genwal: no other Utah mine presents a similar issue and none have been treated differently. The Board may elect to proceed with rulemaking to address options for providing long-term financial assurances, but such rulemaking is not required and is not precluded by upholding the Division Order.

Submitted this 19th day of October 2010

Steve Alder
Assistant Utah Attorney General
for Utah Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

The Undersigned certifies that a true and correct copy of the foregoing Division's Response to Petitioner's Request for Agency Action was sent to the following persons both electronically and by first class mail this 19th day of October, 2010

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